OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-03 April 12, 2010

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Responses to Issues Raised at the Midwinter Meeting of the Practice and Procedure Committee of the ABA Labor and Employment Law Section

Consistent with the practice of the Board and the Office of the General Counsel, I attended, along with Chairman Liebman and Member Schaumber, the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA of the Labor and Employment Law Section from March 10 through 13, 2010. The primary purpose of this meeting is to discuss and respond to Committee concerns and questions about Agency casehandling processes. During the meeting, I provided responses to questions that the Committee had submitted earlier in the year. Because I believe it is important that you and your staffs be aware of the concerns of the organized bar at the National level and of my thinking on these issues, I am sharing my responses with you. The release of this report on the Agency's Webpage will also serve the interest of informing the broader community of labor-management relations professionals of my exchanges with the ABA P&P Committee practitioners.

While the primary purpose of this outreach activity involving the P&P Committee was to deal with concerns raised on a consensus basis by attorneys with practices representing unions, employees and management, these meetings also provide an opportunity for individual practitioners to communicate their thoughts about the operations of the Office of the General Counsel and the Field operations in particular. As in past years, the very positive comments of the practitioners at the meeting about the professionalism and dedication of the Agency staff with whom they regularly deal confirmed my experience throughout my years of service as General Counsel. The talents and energy of Board employees, directed to the enforcement of the National Labor Relations Act, ensure that the public will continue to be well served by the Agency. You have my sincere gratitude for your dedicated public service.

Please note that this memorandum will be released to the public and it notes a number of matters now under consideration. This release will give the public notice and an opportunity to comment on these issues.

/s/
R.M.

Attachment

cc: NLRBU
NLRBPA

Ques: In GC Memorandum 06-05, the General Counsel rolled out his remedial initiative in first contract bargaining cases. GC Memorandum 07-08 outlined additional remedies that should be considered in such cases. In GC Memorandum 08-09, the General Counsel extended for six months the requirement that certain first contract cases be submitted to the Division of Advice. Memorandum OM 09-54, issued on March 30, 2009, directed that such cases be submitted to Advice until further notice.

a. The committee is interested in knowing the reasons for continuing to require such cases to be submitted to Advice. Is there a timetable for discontinuing the requirement and, if not, what are the circumstances under which it would be discontinued?

Ans: The General Counsel continues to require first contract bargaining cases to be submitted to the Division of Advice to ensure that Regional Offices are properly considering special remedies and Section 10(j) relief in first contract cases and to ensure that there is consistent analysis of these issues across the Agency. There presently is no timetable for discontinuing this requirement. While the requirements for submission have been modified over the course of the program (see, e.g., GC 08-09), continued headquarters involvement in the administration of this program is anticipated at least until the Board speaks on the special remedies we have requested.

b. Is the requirement truly mandatory, i.e., do the Regions have any discretion in deciding whether to send a case to Advice?

The submission, which requires a short cover memorandum and the attached decisional documents already prepared by the Regional Office, is mandatory, unless the case has settled and a complaint will not issue.

c. The committee would also like to receive a report updating the first contract case data that was provided last year.

In fiscal year 2009, special remedies described in the General Counsel memoranda were authorized in 23 cases. The following special remedies were authorized in first contract bargaining cases:

- bargaining schedules in 9 cases
- reports on bargaining status in 4 cases
- reimbursement of bargaining costs/litigation expenses in 7cases
- extension of the certification year in 11 cases
- notice reading in 11 cases
- special access to employees by union in 3 cases

Of pending cases in which special remedies were sought in fiscal year 2009, nine cases settled, and 14 cases went to administrative trial. During FY 2009, an ALJ recommended a bargaining schedule in one case in which the General Counsel sought it, but the Board denied that remedy, see *Myers Investigative and Security Services,* 354 NLRB No. 51, n. 2 (July 23, 2009).

Currently, three cases in which special remedies were sought during FY 2009 are pending before ALJs, and eight are currently pending before the Board. In settlement discussions over cases for which special remedies have been authorized, those special remedies will be "on the table" and open for discussion between the Regional Director and the parties.

Ques: Discretion to Revise Default Language in Agreements. There seems to be a wide variation among the Regions with respect to their willingness to entertain proposed changes to the language in the Agency's form settlement agreements, with some amenable to negotiating changes and others not. What discretion do Regional Directors have to modify, add to, or delete the default language that appears in form settlement agreements?

Ans: As set forth in OM 05-96 and Section 10146.7 of the Casehandling Manual Part One Unfair Labor Practice Proceedings, Regions are instructed to consider adding default language in informal settlement agreements when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. The inclusion of the default language is considered on a case-by-case basis and may be modified to fit the particular circumstances of a given case.

Our experience is that the Board routinely has enforced these provisions in ruling on motions for summary judgment filed by Counsel for the General Counsel when there has been a breach of the settlement agreement. Based on this experience and the input of Regional Directors at our conference in November 2009, the General Counsel has decided to consider whether there should be any expansion of the use of default language. There is a potential for considerable savings of resources and avoidance of delays in the event of a breach of a settlement agreement by including default provisions, and by enforcing such provisions in a summary proceeding in the event of a breach. However, there may also be unintended consequences, such as a substantial reduction in our settlement rates. Accordingly, we are considering whether to instruct Regions to routinely seek default language in all informal settlement agreements in the following two circumstances:

1) the informal settlement agreement contains specific affirmative provisions (see CHM Sec. 10516); or
2) the informal settlement agreement is entered into within 21 days of the scheduled opening of the hearing.

As to the first category of cases, Regional Office experience under outstanding GC guidelines demonstrates that default language is an effective and appropriate means to ensure that a charged party/respondent will comply with the affirmative

provisions of the settlement agreement. Since a charged party/respondent that is acting in good faith is merely being required to honor its affirmative commitments made in the settlement agreement, the default language seems a reasonable requirement that ensures that the Agency will not be required to litigate a settled issue.

As to the second category of cases, the default language will have been agreed to by a respondent only after the General Counsel has expended government resources to prepare for an administrative hearing. Failure to abide by the terms of such a "courthouse steps" settlement would require that the government incur the expense of preparing again for the administrative hearing. To avoid that duplicative expense, we are considering whether it would be appropriate to insist that the "courthouse steps" informal settlement agreement contain summary default language. While pinpointing the actual date when initial trial preparation will have required the expenditure of agency resources is difficult, we have decided that the last date under the Board's rules that the Regional Director can reschedule the hearing is a reasonable time frame.

Based on our experience and comments from the public and affected parties, we will decide whether to implement such a program.

Ques: Reinstatement Rates. The Committee is interested in the current statistics on the percentage of alleged discriminatees who are we instated, and the percentage who waive reinstatement, in the settlement of charges.

Ans: According to Table 4 of the draft Annual Report for FY 2009, 1,549 individuals were offered reinstatement as a result of Board proceedings. Of these, 1,214 accepted reinstatement (78%) and 335 declined reinstatement (22%). Table 4 of the Annual Report for FY 2008 shows that 1,839 individuals were offered reinstatement, 1,478 accepted (80%) and 361 declined (20%).

For purposes of comparison, the Annual Reports for the following fiscal years show that,

In FT 1990, 4,026 individuals were offered reinstatement, 3,295 accepted (82%) and 732 declined (18%).

In FY 1995, 6,603 individuals were offered reinstatement, 4,645 accepted (70%) and 1,958 declined (30%).

In FY 2000, 4,549 individuals were offered reinstatement, 3,857 accepted (85%) and 692 declined (15%).

Ques: The Committee is interested in an update on procedural changes that have been made with respect to backpay determinations in light of the Board's decision in *Toering Electric, Oil Capitol, Grosvenor Resort and St. George Warehouse.*

Ans: As you know, Guideline Memoranda issued with respect to all of these cases soon after their issuance providing direction to the Regions and information to our

stakeholders regarding their impact. MEMORANDUM OM 08-29(CH) issued on February 15, 2008, regarding *Oil Capitol*, MEMORANDUM GC 08-04 issued February 15, 2008 on *Toering Electric and* MEMORANDUM GC 09-01 issued on October 3, 2008 regarding *St. George Warehouse.* All of these memoranda are available on the Agency's Website. Since the issuance of these memoranda we have not issued other general guidance on the application of these decisions. Advice and Appeals have considered issues arising under these precedents, however, and memoranda have been sent to the Regions. Some of these memoranda also are available on the Agency's Website. The policies set forth in the guideline memoranda were applied and not modified in these cases.

Ques: The Committee would appreciate a statistical report on cases submitted to Advice, e.g., how many cases have been submitted in the last year; how many have involved mandatory, as compared to discretionary, referrals; how long has it taken, on average, to reach a determination in each case; and how these statistics compare to prior years.

Ans: In FY 09, 597 cases were submitted to the Division of Advice, and they were processed in a median of 16 days. In FY 08, the median case processing time was 20 days; in FY 07 and FY 06, the median case processing time was 21 days. Advice does not keep statistics on the number of mandatory versus discretionary submissions.

Ques: Is there a policy or practice of notifying parties of: the submission of a case to Advice; a decision by Advice; or the publication of a decision by Advice after a case has been closed.

Ans: The Agency has a clear policy of notifying the parties when cases are submitted to the Division of Advice (see ULP Casehandling Manual at Section 11750.1: "The Regional Office should notify the parties that the case is being submitted to the Division of Advice and the specific issue(s) involved."). Advice does not notify the parties directly when it issues a decision; the decision is communicated to the Regional Office, which then promptly notifies the parties.

With regard to the publication of Advice decisions to the general public, Advice memos in closed cases where no complaint will issue are posted about twice a month on the Agency's Website, and Advice memos in cases where complaint is authorized are posted, with redactions if necessary, once the case is closed and there are no open related cases.

Ques: Practitioners reported that the Regions have varying levels of expertise in dealing with the issues associated with handling a case involving a bankrupt charged party. What steps, if any, has the Agency taken to ensure that there are agents in each Region with the requisite knowledge to handle such cases? When, and under what circumstances, are such cases referred to Headquarters for guidance?

Ans: The Board has two units within the headquarters Division of Enforcement Litigation that have extensive bankruptcy experience. These units—the Contempt Litigation and Compliance Branch (CLCB) and the Special Litigation Branch (SLB)—in cooperation with experienced regional personnel, regularly review and update the NLRB casehandling manual provisions containing guidance in bankruptcy, including such subjects as the filing and priorities of claims, disclosure statements and plans of reorganization, rejection of collective bargaining agreements, free and clear sales, etc. This guidance is found in *NLRB Case Handling Manual Part Three—Compliance Proceedings 2009,* Section 10670.

In addition, every Region has a bankruptcy coordinator who provides routine assistance to staff. The individual selected to be the bankruptcy coordinator is the individual in the office with the most bankruptcy-related experience. The bankruptcy coordinators and headquarters experts hold periodic videoconferences to discuss topical issues and share experiences. A senior attorney in our Contempt Litigation and Compliance Branch has visited most of our Regional Offices and provided a 2-day seminar on bankruptcy-related matters.

As detailed in the Compliance Manual, each of the two headquarters litigation offices, the SLB and the CLCB, have special areas of expertise. Cases are referred to them consistent with the manual. They conduct or supervise all adversarial proceedings in bankruptcy and are available to the Regions and are regularly called upon by them, for advice and guidance.

Ques: OM 10-05, addressing skip counsel issues with respect to the service of documents and correspondence, was issued on October 9, 2009. What prompted issuance of the memorandum and is the memorandum tied in any way to the Board's project to establish ethical rules?

Ans: OM 10-05 is not related to the ethics rulemaking project, but rather to our ongoing efforts to ensure that Board agents comply with relevant ethics requirements.

OM 10-05 does not change agency policy. Issuance of the memorandum was prompted when we received a complaint from a Respondent's counsel that, without his authorization, a Region had sent an ALJD and Notice directly to his client. A cover letter to the Respondent sought compliance with the recommended order and gave the Respondent 21 days to inform the Region as to what steps it had taken to comply. Obviously, this communication should have been sent to the Respondent's attorney, absent the attorney's consent to send it directly to the client. Based on this complaint, we thought it appropriate to remind Board agents of their "skip counsel" ethical responsibilities.

Specifically, OM 10-05 highlights and explains Section 11842.3 of the Unfair Labor Practice Casehandling Manual. The Manual provision is entitled "Service on Attorney or Other Representative," and is intended to ensure that Board Agents' service of documents on parties complies with the skip counsel rule. The memo explains that the skip counsel policies reflected in Section 11842.3 apply to the service of all

documents, regardless of the method of service, and that the policies apply in both ULP and Representation cases.

OM 10-05 explains that absent consent or legal authorization permitting direct contacts, even sending a courtesy copy of a document directly to a party or person can violate the skip counsel rule. In essence, it makes clear that, if any Regional correspondence seeks an answer or conveys substantive information, it must be sent to the Respondent's attorney only, unless he or she has agreed to ex parte contact.

Our experience is that, after entering into a settlement agreement with the Director, charged party counsel will usually consent to the Region's direct service of notices upon the charged party. This will relieve counsel of the burden to retransmit the notices after the Region sends the notices to counsel. In order to expedite securing compliance with the remedial posting provisions of settlement agreements, we are considering revising the settlement agreement form to include a provision that will authorize the Region to mail notices required to be posted under the agreement directly to the charged party. If adopted, this change will be announced by a public memorandum.

Ques: At last year's Midwinter meeting, John Higgins and Lori Ketcham (along with Scott Drexel, Chief Trial Counsel of the California State Bar) gave a presentation on the Board's project to establish ethics rules for practice before the Board. What is the status of that project?

Ans: Since last year's midwinter meeting presentation on ethics rulemaking, we have continued to refine our draft rules, including taking into consideration recent revisions made to the ABA's Model Rules of Professional Responsibility, on which the draft rules are based. By basing our rules on the Model Rules, we seek to have state bars and disciplinary officials defer to them in matters involving misconduct allegations in connection with a proceeding before the Agency.

The draft rules will be reviewed by the General Counsel and, when we have a full Board, presented to the Board for approval and then posted for notice and comment rulemaking.

Ques: A separate concern was raised about the level of training of Compliance Officers throughout the system. As the existing Compliance Officers in the Regions become more and more senior and leave the Agency, the concern is that much expertise in this complicated area (including with reference to 10(k), 10(l) and 8(b)(4) issues) will be lost. Does the Board have a plan to deal with this perceived problem?

Ans: Compliance Training for all Board agents is a priority. The Agency has a very active program for the training of new Compliance Officers, as well as ongoing programs to provide professional development for Compliance Officers and Compliance

Assistants. The Division of Operations-Management conducts quarterly Round Tables for Compliance Officers and Compliance Assistants for the informal exchange information and to establish a forum for the discussion of developing issues. The Agency also maintains an Intranet site where resources on Regional Compliance topics can be accessed. The website includes substantive legal resources and technical tools, such as interest calculators and worksheets, as well a contacts for further inquiries. Regular "update" newsletters are posted on the website and are circulated to the Regional Compliance staff every quarter, and also when new developments occur.

In recent years we have been expanding training on Compliance topics to include all professionals so that when vacancies for Compliance Officers are posted, there is a ready pool of qualified applicants. In that regard the Agency has developed instructional modules on litigating compliance cases, bankruptcy and settlement negotiations that are presented at Regional training programs for all professionals. Where the work is available, some field offices have established local training programs that include assigning agents to the compliance team, or compliance case assignments for developmental purposes.

All newly appointed Compliance Officers are assigned mentors, experienced Compliance Officers who provide guidance and advice for at least a year. The Division of Operations Management also monitors the progress of compliance cases monthly and where it appears further training is necessary, we have arranged for senior Compliance Officers or supervisors with extensive compliance experience to be detailed to another office to train a new Compliance Officer. In addition, experts in several Agency Headquarters Divisions, including Operations, Contempt and Compliance Litigation, and Advice are available to provide policy and substantive legal advice, both informally by telephone, and through formal submissions.

This year a Compliance Conference is being planned for July, 2010; all Compliance Officers, Regional Office Managers who supervise compliance and Compliance Assistants will attend training and workshops on compliance topics. This conference will include activities for new appointees and further support the training and development of new Compliance Officers by providing further networking and mentoring opportunities.

Ques: Reports continue to surface that regional offices tend to hurry cases in order to meet end of the month time targets and parties are not given adequate time to respond. The Committee is interested in receiving a status report and the most recent statistics on the Agency's performance against its three overarching goals and the time targets associated with them.

a) What incentives, positive and negative, are in place for the Regions to meet the goals?

b) Has any assessment been made on how these incentives affect the thoroughness of investigations and other behaviors?

Ans: First, as noted in the General Counsel's annual summary of operations (GC Memo 10-01), the Agency exceeded all three of its overarching goals in FY 2009. Thus it closed:

- 84.4% of all R cases within 100 days (target 81%);
- 70.9% of all C cases within 120 days (target 68.5%); and
- 79.7% of all meritorious C cases within 365 days (target 75.5%).

In light of our successes against our overarching goals the Office of Management and Budget has suggested that we revise the goals to be a little bit more robust for FY 2010. Thus, the new goal for Goal I is 85% revised from 82%, for Goal II 71.2, up from 69.5%, and for Goal III 80%, increased from 76%.

In June 2008 we issued OM 08-63, Strategies for Meeting Overarching Goals (OAG). The product of careful study and analysis by a select committee of experienced field managers, this memorandum provides guidance in a number of areas where cases go over the OAG benchmarks unnecessarily. We remain optimistic that, as the practices set out in this OM 08-63 become institutionalized, more and more individual Regional Offices will meet the OAG targets, even as the Agency as a whole continues to meet or exceed those targets. The number of Regions meeting all three targets grew from 10 to 14 during FY 09. Unlike the traditional "time targets" that are incorporated into the Regional Directors' performance plan, the Overarching Goals are not currently individual Regional Goals.

It is important for every Regional Office to strive to meet the targets, and it is critical is that the Agency as a whole meet the targets that is has established for itself.

We have no reason to believe that the OAGs or our traditional "time targets" for completion of investigations have had negative impacts on quality. In addition to the annual Quality Review process, the Agency's processes provide important "checks and balances" for assuring quality—most notably our Quality Review program, the settlement/litigation process for meritorious cases and the appeals process for nonmerit cases. That said, we constantly struggle with the balance between robust performance goals and the need to accord parties due process and the imperative to perform high quality work.

Ques: The Committee would appreciate an update from the General Counsel on his outreach initiative and Initiative for "nip-in-the-bud" cases.

Ans: Since the initiation of the Outreach program, the Regional Offices and Headquarters professionals as well have done a tremendous job of making important information about the Act available to the public and to our stakeholders. Agency professionals have engaged in creative and effective outreach efforts to new groups of citizens and community groups while maintaining our important traditional relationships within the labor and employment relations communities. All Regional outreach coordinators and the two national coordinators from Headquarters continue to

participate in quarterly telephone conference calls to discuss creative and innovative approaches to promote better awareness of the Act.

In FY 09, our Regions participated in over 575 outreach events. A number of these events addressed several hundreds of people, including the Teen Leadership Summit in Baltimore, Maryland; the "From Haymarket to the NLRA" presentation in Anchorage, Alaska; the Plaza Las Americas Mall joint outreach activity in Puerto Rico. Agency personnel have participated in discussions about the Act, the Agency and recent case developments on radio talk shows; and published public service announcements in print media. .

During FY09, 22 Regions published and disseminated interesting and informative newsletters to their local communities. These newsletters are an effective way for the Regions to connect with the labor relations communities in their geographic areas. All newsletters are posted on the Agency's Internet Webpage, www.NLRB.gov, under About Us.

In addition to telephonic inquiries for speakers, the Agency's Speakers' Bureau continues to attract Website requests from diverse members of the public across the country and even from abroad. We have received requests for Agency speakers for high schools, two-year colleges, and universities, trade associations, private employers of all sizes, labor organizations, professional associations, delegations from foreign countries, and community organizations.

As we move into FY10, we are excited about working with Nancy Cleeland, the Agency's new Director of Public Affairs, and Tony Wagner, the new Media Specialist, to increase the Agency's profile and provide relevant and timely information about labor law to the communities we serve. In that light, we anticipate outreach initiatives expanding to include different social networking sites and other media. Our National outreach coordinators welcome the opportunity to brainstorm with you regarding further expansion of our current outreach program.

Regarding the initiative "nip-in-the-bud" announced in GC Memorandum 06-05 (April 19, 2006), in FY 2009 the Regions continue to submit to Advice cases presenting the issue to evaluate for §10(j) relief. In FY09, the Regions submitted 20 such cases to Advice. In five of these cases §10(j) injunctive proceedings were authorized. Of the five cases, three settled after petitions were filed, one petition was filed and later withdrawn because of changed circumstances and in one case the injunction was denied.